Control Services, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 22–CA–16669, 22–CA–16720, 22–CA–16735(1,2), 22–CA–16740(1–11), 22–CA–16758(1–6), 22–CA–16759(1,2), 22–CA–16760(1–6), 22–CA–16771(1, 3–5), and 22–CA–16839

June 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On August 21, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein and to adopt the recommended Order as modified.

1. The judge found, contrary to the Respondent's answer to the complaint and its contentions at the hearing, that the charges in this case had been properly served. The Respondent excepts, apparently solely on the basis that service of the charges was not effected pursuant to the requirements of Rules 4 and 5 of the Federal Rules of Civil Procedure. There is no merit to this contention, the short answer to which is that the Federal Rules of Civil Procedure do not govern service of process in Board proceedings. Moreover, we agree with the judge that the charges were effectively served. Many of the charges were sent to the Respondent at its correct address, 333 Meadowland Parkway, Secaucus, New Jersey, by certified mail, which is a method of service expressly provided for in the Board's rules. Although other charges apparently were not mailed to the correct address, the judge found, and the record establishes, that Union Agent Robert Sarason hand-delivered copies of all the then-existing charges[2] and the original complaint to the Respondent's correct address and left them with the receptionist.

Thus, the record establishes that the Respondent actually received copies of all the charges.[3] The Board has long held that procedural requirements regarding proof of service should be liberally construed, and that when charges have in fact been received, technical defects in the form of service do not affect the validity of service.[4] Accordingly, we find that, because the Respondent actually received copies of the charges, any technical defect in Sarason's method of service did not affect the validity of the service.[5]

Moreover, even if we were to find that the charges sent to the wrong address were never received, the Respondent still would not be prejudiced by the litigation of those matters. That is because the allegations of those charges were almost identical to the allegations of charges that were sent to the Respondent's correct address. Thus, the charges in Cases 22–CA–16735 (1, 2) alleged that the Respondent unlawfully refused to meet for negotiations until March 1990. Virtually the identical allegations were made in the charges in Cases 22–CA–16771 (1, 3–5), which were mailed to the Respondent's correct address; the only difference concerned the locations of the bargaining units for which negotiations were sought. Likewise, the charges in Cases 22–CA–16740 (1–4, 7, and 8) alleged an unlawful refusal to provide information. So did the charges

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's decision contains a number of inconsequential errors. In part II,(b), par. 4, the meeting at Exxon-Linden took place in late December 1988, not on December 2. In part II,(c), par. 2, the expiration date of the Bloomingdale's contract should be June 15 (not December 1), 1989. In part II,(d), par. 1, the third sentence of the Respondent's notice to employees should read, ''If you wish to continue working at this location [not occasion] . . .'' In part II,(d), par. 2 and subsequently, the last name of the employee in question appears to be Jurado, not Juardo. In that same paragraph, Jurado's resignation date was June 30 (not 31), 1989.

In addition, the judge placed a number of occurences on the right dates but in the wrong years. Thus, the record establishes that the year should be ''1990,'' rather than ''1989'' in: part II,(b) par. 9 (last sentence), and par. 10 (last sentence); part II,(c), par. 3, and par. 4 (first sentence); part II,(d), par. 4 (third sentence); part III,(a), par. 1, par. 6 (first and fourth sentences), par. 7 (first sentence), par. 8 (first sentence), par. 9 (first sentence), par. 10 (first sentence); and Conclusions of Law 5 and 6. ''1989'' should appear instead of ''1988'' in part III,(a), par. 6 (first and second sentences), par. 9 (first sentence); and Conclusion of Law 5.

The General Counsel has requested that the Notice to Employees be issued in Spanish as well as English. We grant the request because the record establishes that many of the Respondent's employees speak Spanish.

[2] This includes the charges in Cases 22–CA–16669 and 22–CA–16760(6), contrary to the judge's finding.

[3] The charges in Cases 22–CA–16669, 22–CA–16720, and 22–CA–16839 were also sent by certified mail to Attorney Joel Keiler, who at the time was representing the Respondent in its dealings with the Union. Both the original and the amended complaints were also sent to Keiler by certified mail. The record contains the certified mail return receipts, all of which were signed by Keiler. Those charges and the complaints, then, were validly served on the Respondent for that reason, in addition to the reasons discussed below. *Star Grocery Co*., 245 NLRB 196, 197 (1979).

[4] *Rome Specialty Co*., 84 NLRB 55, 56 (1949). The Board in that case held that, even though the Board agent had served the charge by regular mail instead of by registered mail, the charge had been received, and valid service had been made. See also *Olin Industries v. NLRB*, 192 F.2d 799 (5th Cir. 1951).

[5] The judge's decision refers only to Sec. 102.113 of the Bord's Rules. That section relates to service of process and papers by the Board. In actuality, the relevant sections are Secs. 102.14 and 102.114. The former provides that the charging party is responsible for the service of the charges. The latter sets forth the requirements for service of papers by parties. For the reasons set forth here, we find that the requirements of these two sections were met.

The Respondent does not appear to argue that the charges were not *timely* served as required by Sec. 10(b) of the Act. That issue, therefore, is not before us.

in Cases 22–CA–16758 (1–6), which were mailed to the correct address.[6] Because the allegations in the erroneously addressed charges are closely related to those in the charges that were mailed to the Respondent's correct address—that is, the former involved the same legal theories, factual situations, and defenses as the latter—the former allegations could have been included in the complaint, or added to it by way of amendment, even if separate charges regarding those matters had not been filed.[7] That being the case, the Respondent would not be adversely affected by the inclusion in the complaint of the allegations in the charges in question, even if we were to find the service of those charges to be materially defective.

2. The complaint alleges, and the judge found, that the Respondent violated Section 8(a)(5) and (1) of the Act on July 1, 1989, when it unilaterally reduced the wages and hours of employees in the bargaining unit at Exxon-Linden, and eliminated their health insurance. The Respondent defends its action on the basis that it bargained to impasse with the Union concerning the Exxon-Linden unit in September 1988, and in December 1988 lawfully implemented its final offer. That offer contained a management-rights clause and a ''most favored nation'' clause, which together, the Respondent contends, permitted it to make the July unilateral changes.[8]

The Respondent first argues that, under both the terms of its 1988 offer and of the expired contract covering the employees at Exxon-Linden, it had the right to reduce the hours of work of unit employees. Under the Respondent's reasoning, because part-time employees received lower wage rates and were not entitled to health insurance coverage, the employees' loss of health insurance, and most of their reduction in wages,[9] were the direct result of its reduction in their hours of work, which it effected pursuant to its rights under the contracts.

Second, the Respondent relies on a ''most favored nation'' clause contained in its final offer. Under that provision, if the Union agreed to grant more favorable conditions to a competitor of the Respondent, the Respondent would immediately have the benefit of those conditions. The Respondent contends that it lawfully reduced the wage rates of employees at Exxon-Linden pursuant to the ''most favored nation'' clause. We find no merit to either of the Respondent's arguments.[10]

The judge addressed only the Respondent's defense based on the ''most favored nation'' clause. He found that, even if the parties had bargained to impasse, as the Respondent claimed, it was ''not logically possible'' for the Respondent to implement the ''most favored nation'' clause because, by its nature, the clause required the Union's consent.[11] Because the Union had not given its consent, the judge found the unilateral changes unlawful.

Even assuming that the Respondent had bargained to impasse and thus was entitled to implement the terms of its proposal at Exxon-Linden,[12] we nevertheless

[6] The charges in Cases 22–CA–16740 (5, 6, 9, 10, and 11) contained allegations that are not contained in the complaint. The service of those charges, vel non, therefore is immaterial to this proceeding.

[7] See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc*., 290 NLRB 1115 (1988).

[8] The Respondent also contends that it was under no duty to bargain with the Union at all, for a variety of reasons, all of which are devoid of merit. In adopting the judge's findings in this regard, we note, in addition, the following:

(1) The judge's finding that the Respondent is estopped from contesting the Union's status as the successor to Local 389 finds further support in the fact that the Respondent's proposed contract, which it submitted in September 1988 (nearly a year after the merger of Local 389 into Local 32B-32J) names Local 32B-32J (the Union) as the employees' representative, and in the Respondent's continuing to deduct union dues as late as July 1989, long after the merger. Further, the Union relied to its detriment on the Respondent's failure to challenge the merger; it took no action to reestablish it status, other than to collect authorization cards at two or three facilities in response to Keiler's unfounded suggestion to the Union's negotiator that the Union *no longer* represented a majority of unit employees. In addition, we find that by continuing to treat Local 32B-32J as the representative of its employees after having been informed by the Union's agent that ''New York [Local 32B-32J] had taken over [Local] 389 [and] was calling all of the shots,'' the Respondent knowingly and intentionally waived its right to mount this belated challenge to the Union's representative status. *Ventura County Star-Free Press*, 279 NLRB 412 fn. 1, 419 (1986). Furthermore, we find that the Respondent, having waited more than 6 months after effectively accepting the Union as the successor to Local 389, is precluded by Sec. 10(b) from contesting the Union's successor status now. *Sewell-Allen Big Star*, 294 NLRB 312 (1989).

(2) Concerning the Respondent's claim that the bargaining units are inappropriate because they include guards with nonguards, we note that the collective-bargaining agreements in evidence contain wage scales that refer to various categories of employees; not one mentions guards. (Indeed, two agreements state that the unit consists of cleaning employees, a description that cannot be construed as including guards.) The Board will not find that a unit includes classifications of employees in which no employees ever worked (even if those classifications were included in the parties' recognition agreement) when, as in this case, it may be inferred that the parties did not consider the employees in question to be part of the unit. *White-Evans Service Co*., 285 NLRB 81, 82–83 (1987). If the Respondent actually has, as it contends, hired guards since the close of the hearing, the guards may be excluded from the units by means of a unit clarification proceeding. *Atlanta Hilton & Towers*, 278 NLRB 474 fn. 1 (1986). As for the Respondent's argument that the units include supervisors, we note that the unit descriptions in the contracts speak only of ''employees,'' a term which, under Sec. 2(3) of the Act, specifically excludes supervisors. The record is bereft of evidence that the parties intended to include supervisors in the units, or that supervisors were in fact included in the unit.

With respect to the Respondent's nonmeritorious contention that the Union ''abandoned'' the unit employees, see, e.g., *Pioneer Inn*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

[9] Under the Respondent's implemented 1988 proposal, full-time employees earned $6.97 per hour, compared to $5.67 per hour for part-time employees. Thus, the Respondent contends that when it cut the wage rate to $5 per hour and reduced hours, $1.30 of the wage reduction totaling $1.97 would have taken place automatically because of the employees' conversion from full-time to part-time status.

[10] The Respondent does not contend that the specific changes in wages, hours, and benefits that it imposed effective July 1, 1989, were contained in its September 1988 proposal.

[11] A ''most favored nation'' clause is a mandatory bargaining subject, and an employer may lawfully bargain to impasse over the inclusion of such a clause in a collective-bargaining agreement. *Dolly Madison Industries*, 182 NLRB 1037, 1038 (1970). The question here, however, is not whether the Respondent lawfully bargained to impasse over the ''most favored nation'' clause, but whether it lawfully reduced wages pursuant to the provisions of the clause without notice to or bargaining with the Union. Cf. *Colorado-Ute Electric Assn*., 295 NLRB 607 (1989).

[12] We find no merit in the Respondent's argument that it bargained to impasse concerning the other five units. No bargaining took place regarding the units at Exxon-Florham Park, Exxon-Clinton, Bloomingdales, and Continental

find, as did the judge, that the Respondent's reduction of wage rates at that facility was not justified by the ''most favored nation'' clause in that proposal. Our reasoning, however, is different from the judge's. We find that, whether or not it would have been lawful for the Respondent to have reduced wage rates pursuant to the ''most favored nation'' clause, as it claims to have done, the Respondent failed to demonstrate that the July 1989 unilateral changes were, in fact, made pursuant to that clause. In the first place, the Respondent's memorandum to the Exxon-Linden employees announcing the impending changes made no mention of the ''most favored nation'' clause or of any facts indicating that the reductions were being made to match conditions in effect at any of the Respondent's competitors. Instead, the memorandum stated only that ''Control Services is facing economic cutbacks at Linden Technical Center.''

In addition, although the Respondent sought to introduce documentary evidence and testimony to the effect that the changes in question were made in response to information the Respondent had received concerning conditions at one of its competitors, the judge properly refused to admit that evidence because the Respondent had refused to honor valid subpoenas for documents that would have related to the unilateral changes.[13] And although Attorney Keiler, who had represented the Respondent at the time the changes were made, previously testified[14] that he had received evidence that certain employees of another employer (presumably a competitor of the Respondent) were receiving lower wages than the Exxon-Linden employees, he failed to state whether he received that information before or after the unilateral changes were made, or whether the competitor's employees were doing work that was comparable to that performed by the Respondent's employees. Thus, even assuming Keiler's testimony was not implicitly stricken as a result of the judge's later ruling, it still does not establish that the Respondent was acting pursuant to the ''most favored nation'' clause when it made the unilateral changes.[15]

The judge did not deal with the Respondent's other contention—that it was contractually entitled to reduce the employees' hours of work and, consequently, to reduce their wage rates and take away their health insurance coverage by converting them from full-time to part-time status. That argument, however, does not withstand scrutiny.

Section II,3 of the Respondent's collective-bargaining agreement with Local 389, Local 32B-32J's predecessor, at Exxon-Linden provided that ''Nothing contained in this agreement shall be deemed to constitute a guarantee of any particular number of hours, or any particular days of work per week for any employee.'' Section VI of that agreement provided for higher hourly wages for full-time than for part-time employees. Section VII contained provisions for hospitalization and major medical benefits for ''regularly employed full time (40 hours or more per week)'' employees, but not for other employees. The agreement also contained a ment rights/ment-rights clause (sec. XVIII), which stated, in relevant part, that ''the Company has the unqualified right to schedule hours of employment . . . [or] to relieve employees of duties because of lack of work[.]'' The Respondent's final offer, which it implemented at Exxon-Linden, contained the same provisions just cited, except that the ment rights/ment-rights clause (sec. XVI) provided that

> Whatever conditions of whatsoever kind which have not been specifically mentioned in this Agreement are reserved to the Employer which is free to make unilateral changes concerning those reserved items without the necessity of prior noti-

Towers until the January 1989 session, at which, according to the credited testimony, the Union's attorney, Ronald Raab, assured Keiler that the Union was not, in fact, insisting on areawide recognition. The record does not establish that impasse was reached on that or any other issue with respect to those units. (However, we disavow the judge's statement, in the last paragraph of part III,(a) of his decision, that impasse had not been reached in July 1989 because the Respondent had refused to meet and bargain; that refusal came in 1990, not 1989.)

As for the unit at Automatic Switch, the Respondent has not shown that the parties were at impasse in January 1989, when it implemented the terms of its final (and only) offer. Attorney Keiler testified that those terms were implemented at a meeting of employees that may have taken place *after* his first negotiating session with Raab. Any impasse the parties may have reached prior to that session was broken by Raab's assurances to the Respondent that the Union was not insisting on an areawide agreement. Because the record does not establish that the Automatic Switch offer was implemented before the impasse was broken, the Respondent has not carried its burden of demonstrating that it lawfully implemented the terms of that offer. See *Roman Iron Works*, 282 NLRB 725, 731 (1987), enf. denied on other grounds sub nom. *NLRB v. Koenig Iron Works*, 856 F.2d 1 (2d Cir. 1988).

[13] The judge properly relied on *Bannon Mills*, 146 NLRB 611, 613 fn. 4, 633–634 (1964), and its progeny.

In its exceptions, the Respondent contends that it was not required to comply with the subpoenas, but only because they were not served pursuant to the requirements of Rule 45, Federal Rules of Civil Procedure. There is no merit to that exception. As the judge found, the subpoenas were properly served pursuant to Sec. 11(4) of the Act. We note in addition that service of the subpoenas was effected pursuant to Secs. 102.113 and 102.114 of the Board's Rules and Regulations. Thus, the Union served its own subpoena by certified mail at the Respondent's correct address, and the Respondent refused to accept delivery. The Union's subpoena therefore was served pursuant to Sec. 102.114. Sarason also hand-delivered a copy of the General Counsel's subpoena to the Respondent's principal office and left it with the receptionist (who stated that she could not accept service). In this regard, Sarason was acting as the agent of the General Counsel, and therefore effected service pursuant to Sec. 102.113 which, inter alia, allows for service by the Board ''by leaving a copy . . . at the principal office or place of business of the person required to be served.'' Because Sec. 102.113 contains no requirement that subpoenas be delivered only to agents for service of process, the receptionist's lack of authority to accept service is irrelevant. *Shaw Industries*, 255 NLRB 877 fn. 1 (1981), is not to the contrary. Although the Board there found that service of the General Counsel's subpoena was defective because, inter alia, the subpoena was not served on anyone authorized to receive service in the respondent's behalf, there is no indication that the subpoena was left at the respondent's principal office, pursuant to 102.113 of the Board's rules, or what method of service was used.

[14] That testimony was introduced before the judge made his exclusionary ruling.

[15] Because we rest our decision on the Respondent's failure to show that it made the unilateral changes pursuant to the ''most favored nation'' clause, we are not required to, and do not, decide whether its actions would have been lawful if it *had* made such a showing.

> fication to the Union. The Employer specifically has the unilateral right to subcontract or sell all or any portion of its business. Such subcontracting or sale shall not be a subject of lawsuit or unfair labor practice charge.

The Respondent contends that both its former contract with Local 389 and its 1988 proposal, as implemented, gave it the right to reduce employees' hours of work. The Respondent further contends that, because it was entitled to reduce hours, it had the derivative right to convert the employees from full-time to part-time status, with accompanying wage reductions and loss of health benefits, without bargaining with the Union. We disagree with the Respondent on both counts.

Hours of work are, of course, mandatory subjects for collective bargaining.[16] So are wage rates[17] and health benefits.[18] Accordingly, the Respondent was legally obligated to bargain with the Union over changes in the employees' working hours (and the effects of those changes on wage rates and health benefits) unless the Union had waived, contractually or otherwise, its right to bargain over those subjects. We find no such waiver.

The waiver of a statutory right will not be inferred from general contract language; such waivers must, instead, be clear and unmistakable.[19] We find no evidence of a contractual waiver of the Union's right to bargain over changes in hours, wage rates, or health benefits in either the Respondent's contract with Local 389, or in the Respondent's 1988 proposal. As we have noted, both the former contract and the proposal stated that employees were not guaranteed any particular number of hours of work per week. Those provisions, however, mean no more than what they say: employees had no contractual right to any given number of hours of employment. They cannot be interpreted to mean that either Local 389 or Local 32B-32J had waived its statutory right to bargain over *changes* in the numbers of hours to be worked by unit employees, at least insofar as such changes would automatically result in a lowering of wage rates and a loss of medical benefits.

Still less is it possible to construe the ment rights/ment rights clause of the contract with Local 389 as a waiver of the Union's right to bargain over changes in hours. In the first place, that clause refers, in pertinent part, only to the Respondent's right to *schedule* (not to reduce) hours of work,[20] and to relieve employees of duty (not to reduce their hours) because of lack of work. Second, a ment rights/ment-rights clause is not, in itself, a term or condition of employment that outlives the contract that contains it, absent some evidence of the parties' intentions to the contrary. Thus, any waiver of a union's bargaining rights that is bottomed on a ment rights/ment-rights clause normally is limited to the time the contract is in force.[21] Therefore, to the extent the Respondent relies on the ment rights/ment-rights clause of the former contract, that reliance is misplaced, because there is no evidence that any such waiver inferred from that clause was intended to survive the contract.

The Respondent's reliance on the ment rights/ment-rights clause in its 1988 proposal is even wider of the mark. That proposal, it will be recalled, was implemented after the Respondent asserted that the parties were at impasse in the negotiations regarding the Exxon-Linden unit. There is no indication in the record, however, that either the ment rights/ment-rights clause or the subject of changes in hours of work ever came up in those negotiations; to the contrary, it appears that the only issue discussed was the scope of the recognition clause (the topic over which impasse was reached).[22] Moreover, the ment rights/ment-rights clause in the Respondent's proposal arrogates to the Respondent the right to make unilateral changes, without notifying the Union, in any condition of employment *not mentioned* in the ''agreement.'' The upshot of the Respondent's position, then, is that it was privileged to reduce unit employees' hours of work and, concomitantly, to cut their wages and eliminate their health insurance, all pursuant to a clause that had not even been discussed with, let alone agreed to by, the Union, and which does not advert in any way to the matters at issue except insofar as they come within the extensive rubric of conditions not mentioned in the Respondent's proposal. A more abject failure to meet the ''clear and unmistakable'' standard for establishing waiver of statutory bargaining rights does not readily come to mind. As the Board has stated, ''Where an employer proposal seeks the union's waiver of statutory rights . . . impasse is no substitute for consent.''[23] Consequently, even if the parties bargained to impasse regarding Exxon-Linden, the Union still did

[16] See Sec. 8(d) of the Act.

[17] Ibid.

[18] *Suffolk Child Development Center*, 277 NLRB 1345, 1348 (1985).

[19] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[20] *United Technologies Corp.*, 300 NLRB 902 (1990), is distinguishable from this case. There, the Board found that the union had waived its right to bargain over an increase in Saturday overtime by agreeing to a ment rights/ment functions clause that permitted the employer unilaterally to *determine* ''shift schedules and *hours of work*.'' [Emphasis added.] By contrast, neither the Respondent's contract with Local 389 nor its 1988 proposal allowed the Respondent to determine unilaterally the *number* of hours employees would work.

[21] *Holiday Inn of Victorville*, 284 NLRB 916 (1987); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

[22] A waiver of bargaining rights may be inferred from bargaining history, but only if the matter at issue has been fully discussed and consciously explored during negotiations and the union has consciously yielded or clearly and unmistakably waived its interest in the matter. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). There is no indication that those conditions were met in this case.

[23] *Colorado-Ute Electric Assn.*, supra.

not waive its right to bargain over reductions in hours of work.[24]

In summary, we find that the Union did not waive its right to bargain over changes in hours, wages, and health benefits, and that the Respondent was not contractually entitled to effect the changes in question at Exxon-Linden without first bargaining with the Union. Because we also find that the Respondent failed to show that it reduced the Exxon-Linden employees' wages pursuant to the ''most favored nation'' clause in its 1988 proposal, we affirm the judge's finding that the unilateral changes were unlawful.

3. The judge also found that several named employees at the Respondent's Exxon-Linden facility, who resigned their employment rather than work under the unlawfully imposed conditions discussed above, were constructively discharged in violation of Section 8(a)(3) and (1). In this regard, Rita Jurado testified that she resigned from the Respondent's employ because of the unlawful changes. In addition, because of the Respondent's refusal to comply with valid subpoenas, the judge allowed Sarason to testify that several other individuals had informed him that they also resigned rather than continue to work at Exxon-Linden under the new conditions. The Respondent made no attempt to rebut Sarason's testimony.[25] On the contrary, the Respondent concedes in its brief in support of exceptions that ''it appears that the employees quit because of Control's lawful reduction in their total hours and elimination of health insurance.''

As previously stated, the Respondent is mistaken in the view that its unilateral changes were lawful. Accordingly, we affirm the judge's finding that Jurado and the eight employees named by Sarason were constructively discharged in violation of Section 8(a)(3) of the Act.[26] In affirming the judge, however, we rely on the theory of constructive discharge applicable to employees who quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights.[27] In the instant case, the employees were required to work under conditions that were established in derogation of the right to bargain. We do not rely on *Adscon, Inc*., 290 NLRB 501 (1988), cited by the judge, which represents a different theory of constructive discharge that is not applicable to the circumstances of this case.

4. The judge found that the Respondent violated Section 8(a)(1) of the Act by informing employees at its Exxon-Florham Park facility that they had to remove union insignia (small green dots, worn to show union solidarity) if they wanted to work. We adopt that finding. It is well established that employees have the protected right to wear union insignia at work absent a showing of ''special circumstances,'' such as an adverse impact on production or discipline that might result from the exercise of that right.[28] No such special circumstances have been shown here.

In support of his finding, however, the judge apparently rejected the Respondent's contention that a supervisor for the client, Exxon, had given ''explicit instructions'' that the dots should not be displayed on the employees' badges ''or elsewhere.'' In affirming the judge, we disavow any inference that, had the Respondent been acting on ''explicit instructions'' from Exxon, it could lawfully have prohibited employees from wearing the dots. A desire to please a customer does not, alone, provide a business justification for infringing employees' statutory rights.[29] Unless ''special circumstances'' exist, an employer violates Section 8(a)(1) by prohibiting the wearing of union insignia,

[24] Member Cracraft agrees that neither the ment rights/ment-rights clause of the Respondent's expired contract with Local 389 nor the ment rights/ment-rights provision of the Respondent's 1988 proposed contract constituted a waiver of the union's right to bargain over changes in hours. She relies, however, only on the grounds that it has not been established that the ment rights/ment-rights clause of the Local 389 contract survived the expiration of the contract, and that the Union did not agree to the ment rights/ment-rights clause contained in the 1988 proposal. *Kendall College of Art*, supra, 288 NLRB 1205, 1212. Accordingly, Member Cracraft finds it unnecessary to decide whether *United Technologies Corp*., supra, is distinguishable from this case.

[25] To whatever extent the Respondent may have been precluded from introducing relevant evidence on this subject by the judge's *Bannon Mills* ruling, the problem created was one the Respondent brought on itself by refusing to comply with the subpoenas. *Bannon Mills*, 146 NLRB 611 (1964).

[26] With respect to those eight alleged discriminatees about whom Sarason was permitted to testify, we find no need to decide whether the Respondent's refusal to comply with subpoenas interfered with the General Counsel or Union's ability to call those individuals to testify. It is well-established that an administrative law judge has the discretion to admit and consider relevant hearsay evidence in deciding unfair labor practice issues if the hearsay evidence is ''rationally probative in force and . . . corroborated by something more than the slightest amount of other evidence.'' *RJR Communications*, 248 NLRB 920, 921–922 (1980). Sarason's testimony is probative, partially corroborated by employee Jurado's testimony, *and*, as previously stated, the Respondent does not contest its veracity.

Chairman Stephens agrees that the judge properly found that Jurado was constructively discharged. However, he would not find that the other named employees were constructively discharged on the basis of Sarason's hearsay testimony. Unlike the majority, Chairman Stephens does not find that Jurado's testimony, which addressed only her own reasons for quitting, sufficiently corroborated Sarason's testimony that the latter may be admitted as evidence.

Chairman Stephens would not foreclose all possibility of finding that those employees were constructively discharged, however. In his view, once one or more constructive discharges resulting from unlawful unilateral changes have been identified and the violation found, any other possible constructive discharges may properly be treated like other damages to employees resulting from such unlawful changes. That is, both the identities of the employees adversely affected by the changes and the extent of their damages are matters that may be left to compliance proceedings. Accordingly, Chairman Stephens would permit the named employees other than Jurado, like any former employees who have not yet been identified, to testify in compliance proceedings concerning the circumstances of their separation from the Respondent's employ, and to be found to have been constructively discharged if the record would support such a finding.

[27] E.g., *White-Evans Service Co*., supra at 81–82.

[28] See, e.g., *NLRB v. Malta Construction Co*., 806 F.2d 1009, 1011 (11th Cir. 1986); *Fabric Services*, 190 NLRB 540, 541 (1971).

[29] *Fabric Services*, supra, 190 NLRB at 542.

In any event, Supervisor Timothy Pernell, who made the unlawful statement, conceded that, although the Exxon superintendent told him the employees should remove the dots from their badges, Pernell went beyond that instruction and told the employees to remove the dots from their uniforms and faces as well.

whether it does so on its own or at the behest of another employer.[30]

5. The judge concluded that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing an existing condition of employment, established in expired contracts, when it denied the Union continuing access to unit employees working at the Bloomingdale's and Automatic Switch facilities and when it denied the Union access to seniority lists for those employees. We affirm this conclusion only as to the Union's access to employees. The complaint did not allege and the General Counsel has not argued that the Respondent unilaterally changed an established practice of access to seniority lists, at customer sites or elsewhere. The expired contracts make no specific reference to such access. We shall modify the recommended notice and Order by deleting provisions for access to seniority lists.[31]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

''(d) Denying the Union access to the Respondent's employees, where such a denial of access would constitute a unilateral change in terms and conditions of employment of employees represented by the Union.''

2. Substitute the following for paragraph 2(a).

''(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate bargaining units concerning terms and conditions of employment and, if understandings are reached, embody the understandings in signed agreements:

''(a) All employees except window cleaners employed by the Respondent at the Exxon Research and Engineering site in Linden, New Jersey.

''(b) All cleaning employees except window cleaners employed by the Respondent at the Exxon Research and Engineering site in Clinton, New Jersey.

''(c) All employees except window cleaners employed by the Respondent at Exxon Research and Engineering facilities in Florham Park and Morristown, New Jersey.

''(d) All employees employed by the Respondent at Bloomingdale's Department Stores, Hackensack, New Jersey.

''(e) All employees employed by the Respondent at the Automatic Switch Company premises on Hanover Road in Florham Park, New Jersey.

''(f) All cleaning employees except window cleaners employed by the Respondent at the Continental Plaza, in Hackensack, New Jersey.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain with Local 32B-32J, Service Employees International Union, AFL–CIO at reasonable times.

WE WILL NOT refuse to furnish relevant information requested by the Union for purposes of collective bargaining.

WE WILL NOT withdraw recognition from the Union.

WE WILL NOT deny the Union access to our employees where such a denial of access would constitute a unilateral change in terms and conditions of employment of employees represented by the Union.

WE WILL NOT unilaterally reduce the wage rates or hours of employment or eliminate the medical insurance benefits or any other benefits of employees without bargaining with the Union.

[30] There is no merit to the Respondent's contention that it did not know the green dots had anything to do with the Union. Pernell admitted that he had been informed that the Union had told the employees to wear the dots.

Gimbel Bros., 147 NLRB 500 (1964), on which the Respondent relies, is distinguishable from this case. In *Gimbel Bros*., the Board adopted the trial examiner's finding that the employer did not restrain or coerce employees, or interfere with an election, by asking employees not to wear flowers that had been distributed by the joint petitioners on the morning of the election. On the facts of that case, the trial examiner rejected the contention that wearing the flowers identified the sympathies of the employees. Here, by contrast, the green dots were worn by the employees expressly as a show of solidarity and to show that they wanted a union.

[31] However, we have adopted the judge's findings that the Respondent unlawfully refused to provide certain information requested by the Union. Among the items of information requested were the names of unit employees and their seniority dates. Under the terms of the Order, the Respondent will be obliged to furnish that information. Thus, even though we find no unlawful unilateral change in the Respondent's refusal to provide access to seniority lists, the Union will receive the information it sought.

WE WILL NOT bar our employees from wearing union insignia.

WE WILL NOT discharge or constructively discharge any of our employees because of their membership in and/or activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate bargaining units concerning terms and conditions of employment and, if understandings are reached, embody the understandings in signed agreements:

(a) All our employees except window cleaners employed at the Exxon Research and Engineering site in Linden, New Jersey.

(b) All our cleaning employees except window cleaners employed at the Exxon Research and Engineering site in Clinton, New Jersey.

(c) All our employees except window cleaners employed at Exxon Research and Engineering facilities in Florham Park and Morristown, New Jersey.

(d) All our employees employed at Bloomingdale's Department Stores, Hackensack, New Jersey.

(e) All our employees employed at the Automatic Switch Company premises on Hanover Road in Florham Park, New Jersey.

(f) All our cleaning employees except window cleaners employed at the Continental Plaza, in Hackensack, New Jersey.

WE WILL offer Luiza Bezerra, Rita Jurado, J. Bentencourt, A. Diaz, L. Dessnatos, J. Malinowaski, J. Pinkiewicz, J. Pinton, R. Wasilco, A. Zasadzki, and any other employees in the Exxon-Linden bargaining unit who were constructively discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make whole employees in the bargaining units for any losses in earnings and/or benefits that resulted from the unilateral changes we made in wage rates, hours, benefits, or any other terms and conditions of employment, with interest.

CONTROL SERVICES, INC.

Gary A. Carlson, Esq. and *Steve Kessler, Esq.*, for the General Counsel.
Richard B. Slosberg, Esq., for the Respondent.
Larry Engelstein, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark New, Jersey, on April 11 and 12, 1990. The charges were filed on various dates from November 1989 to March 1990 and a first amended consolidated complaint was issued by the Regional Director for Region 22 on March 27, 1990. In substance the General Counsel makes the following allegations:

1. That the Union has been recognized and is the collective-bargaining representative pursuant to Section 9(a) of the Act in the following separate bargaining units.

(a) All employees except window cleaners employed by Control Services, Inc. at the Exxon Research and Engineering site in Linden, New Jersey.

(b) All cleaning employees except window cleaners employed by Control Services, Inc. at the Exxon Research and Engineering site in Clinton, New Jersey.

(c) All employees except window cleaners employed by Control Services, Inc. at Exxon Research and Engineering facilities in Florham Park and Morristown, New Jersey.

(d) All employees employed by Control Services, Inc. at Bloomingdale's Department Stores, Hackensack, New Jersey.

(e) All employees employed by Control Services, Inc. at the Automatic Switch Company premises on Hanover Road in Florham Park, New Jersey.

(f) All cleaning employees except window cleaners employed by Control Services, Inc. at the Continental Plaza, in Hackensack, New Jersey.

2. That since November 21, 1989, the Respondent has failed and refused to bargain with the Union in the six units described above.

3. That in late November 1989 and thereafter, the Respondent has withdrawn recognition from the Union in the above-described units and has since December 1989 refused to accept correspondence from the Union.

4. That the Respondent has refused to furnish certain information necessary for bargaining requested by the Union in December 1989 and January 1990.

5. That the Respondent on or about July 1, 1989, without affording the Union an opportunity to bargain, reduced the wages, hours, and benefits of the employees in the Exxon-Linden bargaining unit.

6. That as a consequence of the actions described in paragraph 5, the Respondent constructively discharged certain

named employees as well as other employees whose identities were unknown to the General Counsel.

7. That in January 1990, the Respondent, without affording the Union an opportunity to bargain, altered the existing terms and conditions of employment of the employees at the Bloomingdale's and Automatic Switch locations by denying union representatives access to the premises where those employees were working.

8. That the Respondent, on or about December 5 and 6, 1989, ordered its employees at the Exxon-Linden jobsite to remove union insignia.

9. That the Respondent, on June 15, 1989, unlawfully discharged Luiza Bezerra because of her membership in and/or activities on behalf of the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that is a New Jersey corporation with its principal place of business in that State. It admits that during the 12 month period preceding the issuance of the complaint, it has performed services valued in excess of $50,000, outside the State of New Jersey. Further, the Respondent concedes and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent contends that the charges on which the complaints are based, were not served on the Respondent.

With respect to this contention, the initial charge in these cases was filed on November 29, 1989, and the last charge was filed on March 1, 1990. The formal papers which were received into evidence as General Counsel's Exhibit 1 show that in all cases the charges were sent to the Respondent at its correct address, 333 Meadowland Parkway, Secaucus, New Jersey 07084, by certified mail with return receipts requested. (In many cases a copy of the charges were also mailed to the Company's attorney Joel Keiler.) In a significant number of cases, the evidence shows that the envelopes containing the charges were either unclaimed or refused by the Company on delivery by the postman. As a consequence, on February 26, 1990, Union Agent Robert Sarason hand delivered all of the extant unfair labor practice charges to the Company's offices at the above noted address where he left them with the receptionist. (That included all of the instant charges except for Cases 22–CA–16669, 22–CA–16760(6), and 22–CA–16839.)

Section 102.113 states:

> *Methods of service of process and papers by the Board; proof of service*.—(a) Charges, complaints and accompanying notices of hearing, final orders, administrative law judges' decisions, subpoenas, and other process and papers of the Board, its members agent, or agency may be served personally or by registered or certified mail or by telegraphy or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same.

In accordance with the above, I conclude that the unfair labor practice charges were properly and timely served when they were mailed by the Regional Office by certified mail. I also conclude that they were delivered in the normal course of business by the United States Postal Service and to the extent that they were not ''received'' by the Respondent, this was due to the Respondent's refusal to accept such mail.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Bargaining History*

The Respondent for some time maintained a collective-bargaining relationship with a predecessor union named Service Employees International Union, Local 389. That relationship involved six of the Respondent's work locations, these being: Exxon-Linden; Exxon-Florham Park; Bloomingdale's; Continental Towers; Exxon Clinton; Automatic Switch

The collective-bargaining agreements between the Company and the Union covered each of the above locations as a separate bargaining unit. The contracts were to expire on various dates in 1988 and 1989 and essentially, the employees covered were the cleaning personnel. None of the contracts purported to include guards and in fact, none of the units contained guards or security type of employees.[1] Local 389 merged into the Charging Party, Local 32B-32J, Service Employees International Union effective on September 1, 1987.

B. *The Contract Negotiations*

On September 15, 1988, the Respondent's attorney, Joel Keiler met with Union Agent Nicholas Caprio Sr. Caprio told Keiler that New York had taken over Local 389 and was calling all the shots. Caprio said that his hands were tied and that he had to have an areawide agreement with the Respondent for all of New Jersey north of Interstate 95. Keiler testified that he told Caprio that the Company could not agree to an areawide agreement. According to Keiler, Caprio replied that his hands were tied and that unless there was an areawide contract there could not be any contract. At that

[1] After the hearing concluded, the Respondent, on July 10, 1990, made a motion to reopen the record to show that it had hired ''guards'' after the hearing had closed. As the Union has never purported to represent any guards of this employer and as there is no indication that it presently seeks to represent guards, the Respondent's offer of proof is irrelevant. The historical bargaining units in the present cases did not include guards and it is not within the power of the employer to unilaterally change the bargaining units to include guards. This is particularly true as the Respondent wants to assert that such a change would therefore disqualify the Union from representing any employees because of Sec. 9(b)(3) of the Act. This attempt by the Respondent to hoist itself by its own petards is rejected as is its motion.

Similarly I deny the Respondent's posttrial motion to receive into evidence a copy of the Union's New Jersey Independent Agreement. While the Respondent asserts that this document proves that the Union represents guards and nonguards at other employers, it does not claim nor is there any evidence to show that the Union is seeking to represent any unit of guards and nonguards employed by this Respondent. Therefore the document is irrelevant to any legitimate issue in this case.

point, according to Keiler, he tendered the Company's proposal regarding the Exxon-Linden unit and said that because they seemed to be at an impasse over the recognition clause, the Company's proposed contract was therefore its final offer. Keiler testified that Caprio merely stated OK. None of the Union's witnesses controverted Keiler's testimony as to this meeting.[2]

Keiler testified that in November 1988, he called Caprio Sr. and asked for a meeting over Automatic Switch. Keiler testified that Caprio asked if he was going to take the same position. Keiler states that when he answered affirmatively, Caprio said that a meeting would be a waste of time because if the Company did not agree to the areawide contract there was no point in negotiating. Keiler told Caprio that he at least wanted to give his proposal for Automatic Switch and that they agreed to meet on December 2.

On December 2, 1988, the meeting was canceled by Caprio and Keiler left his contract proposal regarding the Automatic Switch unit at the travel agency next door to the Union's office.

Also on December 2, 1988, the Company held a meeting with the bargaining unit employees at Linden and told them that it was putting into effect the Company's ''final offer.'' As a result, the employees at this location received a wage increase. Similarly, in January 1989, the Company gave the employees at Automatic Switch wage increases consistent with the company proposal left at the travel agent on December 2, 1988.

On January 19, 1989, a meeting was held between the Union and the Company. According to Keiler, the Union's attorney, Ronald Raab, said that the Union had to have the areawide agreement. Keiler states that when he pointed out that the recognition clause was illegal, Raab agreed. According to Keiler when he asked why Raab was pushing this thing, Raab replied that the Union can not organize new locations individually. According to Keiler, Raab asked if the Company's proposals for Florham Park and Clinton were the same and Keiler replied that they were.

Ronald Raab testified that he met with Keiler once in January 1989 and on another occasion in May 1989. His testimony, which I credit, was that on both occasions he told Keiler that although the Union would prefer having an areawide contract, it was not insisting on one and was willing to bargain on an individual basis in each of the separate bargaining units. Raab further testified that Keiler expressed doubt that the Union continued to represent the employees at the Automatic Switch, Exxon-Linden, and Exxon-Florham Park locations. Raab states that he thereupon told Union Agent Caprio to get new authorization cards which were mailed to Keiler in May 1989. (According to Luiza Bezerra, the shop steward at Exxon-Linden, in the spring of 1989 she solicited and obtained union authorization cards from about 19 of the bargaining unit employees. She testified that about 12 or 13 employees did not sign.)

[2] The Respondent offered into evidence a letter dated September 19, 1988, which simply confirms Keiler's version of the September 15 meeting. I rejected the letter essentially because the Respondent refused to produce various documents in response to subpoenas properly served on it before the hearing. Also, as the letter is basically redundant to Keiler's unrebutted oral testimony, the letter itself is not particularly relevant. I therefore reject the Respondent's posttrial motion to receive this letter into evidence.

Subsequent to a meeting of the negotiators held on or about May 4, 1989, the Union did not pursue further negotiations until September 1989 when it called in Robert Sarason, an International representative to assist the Local Union.

On November 21, 1989, Union Agent Sarason sent six separate letters to the Company, each of which requested the renewal of negotiations at the six respective bargaining units.

Sarason states that on November 30, 1989, he called Keiler who said that he had sent a response to the Union's letter. According to Sarason, Keiler said that he would not be able to meet until March 1990 and that when asked why the delay, Keiler said because of the Union's delay and because his schedule was filled up until then. Sarason states that a series of meetings were arranged for early March 1989, but that he told Keiler that he was reserving his right to file an unfair labor practice charge regarding the Company's unwillingness to meet at an earlier time.

Keiler's testimony was that Sarason telephoned him and asked if he had received the Union's letter. According to Keiler, he did not respond whereupon Sarason said, ''Hello, hello.'' Keiler states that he remained silent, whereupon Sarason said aren't you going comment on it. Keiler states that he told Sarason that there was nothing to comment on and mentioned that he had sent a reply letter. He states that when Sarason asked what was in the letter he replied, ''When you get it you can read it.'' Keiler states that when pressed about the letter, he told Sarason that it basically said that he had not heard from the Union for over 6 months and that he was very busy until March. According to Keiler, when Sarason said that such a delay was an unfair labor practice, he ignored Sarason's comment and did not reply. Keiler states that when Sarason said that he would file an unfair labor practice charge, Keiler said that he did not want stop him because he made his living from charges being filed. At the conclusion of the phone conversation, Keiler states that they agreed to meet on March 1, 2, and 5–8, 1989.

On December 4, 1989, Sarason sent a letter to Keiler which confirmed the meeting dates. Also on the same date the Union sent a series of identical letters to Keiler, each of which requested certain information as to each of the respective bargaining units. In pertinent part the letters requested:

> (1) The most current list of employees with the following information.
>
> Full Name
> Address
> Seniority Date
> Hourly wage Paid
> Position
> Hours worked
>
> (2) A copy of the health insurance plan, if any, a listing of employees and the type of coverage they have, and the cost of such coverage.
>
> (3) A copy of the life insurance plan, if any, a listing of employees and the type of coverage they have, and the cost of such coverage.
>
> (4) A copy of the drug prescription plan, if any, a listing of employees and the type of coverage they have, and the cost of such coverage.
>
> (5) The most current and comprehensive set of rules and regulations that has been distributed to the Control employees at this particular work-site.

On December 13, 1989, Sarason called Keiler to ask if he had gotten the requests for information. This generated some give and take as to when the Company would respond.

On December 14, 1989, Sarason remailed the previous letters requesting information by certified mail because among other things, Keiler in the previous day's conversation, said that he had not received the first set of letters yet. With respect to the new set, the evidence shows that Keiler refused to accept delivery of five of the six letters. (There is a return receipt signed by Keiler showing delivery of the letter regarding the Exxon-Clinton unit on December 28, 1989.)

On January 10, 1990, Sarason sent a letter to the Company's president, Edward Turen, complaining that the Respondent's attorney was not accepting the Union's certified mail. Enclosed with this letter were copies of the previous letters sent to Keiler requesting information. In addition, the Union by letter dated January 10, 1990, to Turen requested the following information regarding the employees in each of the bargaining units.

> 1. Full name
> 2. Address
> 3. Seniority date
> 4. Regular hourly wage paid.
> 5. Number of hours worked each week for each week since June 1, 1989.
> 6. Gross compensation paid for each week since June 1, 1989.
> 7. The number of hours that this employee worked for Control at locations other than the above designated location.
> 8. The amount of vacation benefits paid to each unit employee in 1989, and to each bargaining unit employee who separated from Control during 1989, and for all such employees, their seniority dates.
> 9. All changes in wage rates, or regularly scheduled hours, for any bargaining unit employee during 1989.
> 10. All changes in insurance benefits, or policies provided bargaining unit employees in 1989.

The letter requesting the additional information (described immediately above), was sent by Express Mail, return receipt requested. The envelope shows that it was delivered, but refused by the addressee.

According to Sarason, on January 16, 1990, he called Keiler who said that he had received a copy of the Union's requests for information. Sarason states that when he asked Keiler when the information would be provided, Keiler said that he did not know when they were going to provide it. According to Sarason, when he told Keiler that failure to provide the information in a timely fashion would cause the Union to file an unfair labor practice charge, Keiler responded that he did not care if the Union filed charges; that more charges meant more money for him.

Sarason states that on February 27, 1990, he called Keiler and asked if he was going to provide the requested information before the bargaining began on March 1. According to Sarason, Keiler replied that the Company had not yet decided whether to give the information or even to bargain. Keiler said that the Company might just wait until the unfair labor practice case was finished in the court of appeals before commencing to bargain. According to Sarason, when he said that the Union would seek relief, Keiler said what kind of relief could you seek besides filing another charge and waiting 2 years to get a decision.

Sarason states that on February 28, he called Keiler and asked if he had made a decision. According to Sarason, Keiler said that the Company had decided to litigate rather than negotiate a contract and that it was not going to do both. Then Sarason said that he was going to file more charges, Keiler said that he was neither going to give the information requested nor bargain on March 1, 1990.

Keiler testified that during a phone conversation with Sarason, he told the latter that he was thinking about whether he would show up for the negotiations scheduled in March. He states that he told Sarason that because the NLRB has decided to issue a complaint, and because Newark was such a rotten place, nobody in his right mind would go there twice; once to negotiate and once to have a trial over why they did not negotiate. Keiler states that he said that if he had to go to Newark, he would would go only once and would make up his mind the following day.

According to Keiler, on February 28, 1990, he called Sarason back and told him that as long as he had to defend a refusal to bargain complaint, he was not going to bargain. Consequently, he canceled the March 1 meeting.

No meetings have been held between the parties since the meeting of May 4, 1989. Also the Company has not turned over to the Union any of the information requested.

On March 7, 1990, Sarason sent a letter to Keiler reading:

> On February 27, 1990 you canceled the scheduled negotiations. Please be advised the Union has filed unfair labor practice charges regarding your refusal to bargain.

C. *Refusal to Grant Access*

The collective-bargaining agreement covering the employees at Automatic Switch, which expired on October 31, 1988, reads:

> 21. The Union's representatives shall at all times be permitted to confer with the employees at and on the premises of the Employer.
> 22. Eor the purposes of determining the workers employed by the Employer who should be members of the Union under the terms of this Agreement, the Union shall have the right to inspect the Employer's compensation payroll records.

The contract covering the Bloomingdale's unit, which expired on December 1, 1989, has the same provision.

On January 10, 1989, Sarason went to Bloomingdale's to speak to the bargaining unit employees but was not let in by Bloomingdale's security personnel at the direction of the Respondent.

Sarason states that during a phone call he had with Keiler on January 16, 1989, he mentioned that when he had gone to Bloomingdale's he had been denied access. According to Sarason, Keiler said that Sarason had no right to be there and that he also would not be allowed access to Automatic Switch to talk to employees regarding grievances or union business. Sarason states that when he told Keiler that the Union had a right to inspect seniority lists, Keiler said that

the Union had absolutely no right to look at seniority lists and that he was not going to let it do so.

D. *Reduction in Wages, Hours, and Benefits at Exxon-Linden and the Alleged Constructive Discharges*

In June 1989, the Company distributed a memorandum to its employees at the Exxon-Linden location. This read:

> Control Services is facing economic cutbacks at Linden Technical Center. Due to these cutbacks we are forced to reduce benefits and wages being currently offered effective July 1, 1989. If you wish to continue working at this occasion it will have to be with reduced benefits and at an hourly wage rate of $5.00 per hour for 4 hours per night.
>
> Please let Lillian Lopez . . . know by the end of your shift today if you will be returning to work on Monday July 3, 1989. If you do not let us know we will be replacing your position effective midnight tonight.

Rita Juardo testified that on June 31, 1989, she quit at Linden because of the reduction in her wage rate, hours, and benefits.

Because of the Respondent's refusal to furnish information to the Union, the Union did not have an up-to-date list of the Respondent's employees. Also it had no means to completely determine which employees left employment at or around the time that the reduction in wages and benefits occurred.

Prior to the outset of the trial the Union issued a subpoena duces tecum to the Respondent. This subpoena (along with a subpoena issued by the General Counsel), was served initially by registered mail which was refused. The Union's and the General Counsel's subpoenas were then personally served by Sarason when he left them at the Company's headquarters on April 4, 1989. (The Union's subpoena was accompanied by a check for a witness fee and travel expenses.)[3] Among other things, the Union's subpoena required the Respondent to produce at the hearing, documents regarding the Respondent's employees at the Exxon-Linden location showing their working hours, the names of the employees who terminated in June, July, and August 1989, and any changes in wage rates or other changes in 1988 and 1989. Similarly, the General Counsel's subpoena called for the Respondent to produce the paroll records for every individual employed by the Respondent at the Exxon-Linden location during 1989.

Because the Company refused to supply to the Union the names and addresses of its employees and because of the Company's contumacious refusal to honor valid and properly served subpoenas, I permitted Sarason, pursuant to *Bannon Mills, Inc*., 146 NLRB 611 (1964), and its progeny,[4] to testify that certain employees had told him that they had resigned because of the reduction in wages, hours, and benefits put into effect at the Exxon-Linden location. Such employees included J. Bentencourt, A. Diaz, L. Dessnatos, R. Juardo, J. Malinowaski, J. Pinkiewicz, J. Pinton, R. Wasilco,[5] and A. Zasadzki.

The Company's defense to the above is that because it had proposed a most favored nation's clause and because negotiations had reached an ''impasse,'' back in December 1988, it was free to put into effect the reductions at Exxon-Linden. It therefore argues that even if employees resigned because of these reductions, the General Counsel has not made out a case of constructive discharges. For the reasons discussed below, I reject all of these arguments.

E. *Union Insignia*

In December 1989 the Union held a meeting at the Hamilton Park Hotel across street from the Exxon Florham park location. Employees were given little green dots to wear to show unity. (The dots were about one-fourth inch in diameter or the size of paper punch holes.)

According to Ruby Winston the Union's shop steward at the Exxon Florham Park location, on December 6, 1989, Supervisor Timothy Pernell asked her to remove the dots. She states that when she told him that the Union told the workers that they could wear the dots, Pernell said that he wanted them removed or she would not have a job the next day. According to Winston, after some give and take about the dots, Pernell said that they had no union; that she had no rights; and that it was his show which he would run as he wanted to.

According to Pernell, one of the Exxon night-shift superintendents asked him why employees had green dots on their badges whereupon Pernell, went to leadman, Guy Nicaise, to ask what the green dots were for. According to Pernell, Nicaise told him that the Union had given out the green dots, whereupon he called Joe Salvatoriello and asked what to do. Pernell states that Salvatoriello told him that the employees could not wear the dots on their badges if the customer did not want them to.

Pernell testified that at some point after December 5, 1989, he told about four employees including Ruby Winston to take the dots off their badges. In relation to his conversation with Winston, he states that he told her that the Company was an outside contractor working in someone else's building and that they were the ones that were making the rules and regulations in reference to the badges which did not belong to Control. According to Pernell, when Winston said she would not take off the dots, he told her that if she did not, he was not going to let her work. Pernell denies telling Winston that there was no union at the location or that she was going to get a refund of her union dues.

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[3] Sec. 11(4) of the Act provides in pertinent part that ''Complaints, orders and other process and papers of the Board . . . may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. In *Pasco Packing Co*., 115 NLRB 437 (1956), the Board held that valid service was made where the Respondent willfully refused to accept registered mail. See also *M. J. Santelli Mail Services*, 281 NLRB 1288, 1293 (1986), where the ALJ held that there was valid service of subpoenas where the Respondent refused to accept the envelopes in which they were mailed.

[4] See also *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32 (1st Cir. 1981); *NLRB v. C. H. Sprague & Co*., 428 F.2d 938 (1st Cir. 1970); *NLRB v. American Art Industries*, 415 F.2d 1223 (5th Cir. 1969); *Feld & Sons, Inc*., 263 NLRB 332 (1982); *Louisiana Cement Co*., 241 NLRB 536, 537 fn. 2 (1979); *Midland National Life Insurance Co*., 244 NLRB 3, 6–7 (1979). Contra see *NLRB v. International Medication Systems*, 640 F.2d 1110 (9th Cir. 1981), where the court held that where a Respondent refused to obey a subpoena, the Board's only remedy was to seek enforcement in a Federal District Court.

[5] Regarding R. Wasilco, I did not permit the Respondent to produce evidence which it attempted to offer for the purpose of showing that this person was a supervisor. I did not permit the Respondent to adduce such evidence because the Respondent refused to comply with the General's Counsel subpoena which called for it to produce, among other things, records showing the job classifications of its employees at Exxon-Linden during 1989.

Regarding the green dots, it is noted that although the vast majority of the Respondent's employees work at night, the majority of Exxon's people work during the day. Also, as the green dots were very small, their presence on the badges can only be described as insignificant. Moreover, although Pernell testified that Exxon's superintendent asked about the dots, he did not testify that Exxon had given explicit instructions barring them from being displayed either on the badges or elsewhere.

F. *The Discharge of Luiza Bezerra*

Luiza Bezerra was the Union's shop steward at the Exxon-Linden bargaining unit.

As noted above, the Company held a meeting with the employees at this location in December 1988 where it announced that a wage increase would be given. According to Bezerra, when ment rights/ment said that they were going to give a raise, she stood up and said that the money was not important; that it was much more important to have the Union because the employees wanted to keep their jobs. She states that the company spokesman said that the Union just wanted the people's money and that she repeated that the employees wanted to keep the Union.

In the spring of 1989 (probably around May), Bezerra at the Union's direction, solicited the employees at Exxon-Linden to sign new union authorization cards that were ultimately turned over to the Company. She obtained cards from about 19 employees whereas about 12 or 13 did not sign.

On or about June 9, 1989, Bezzera's baby had a fever and the babysitter could not take care of her. According to Bezerra, she called Rita Juardo, a coworker with whom she normally drives to work, and asked her to tell the supervisor that she would not be able to get to work that day because she had to go to the doctor. In this regard, Juardo testified that when she arrived at work, she told Lillian Lopez and her assistant, Richard Wasilco, that Bezerra was not coming in because her child was sick.

On June 12, 1989, Bezerra was discharged. When she asked why, Wasilco said that Lillian Lopez told him that it was because she did not call in on the day that she was out.

Regarding the discharge of Bezerra, Lillian Lopez, who at time of trial was on temporary leave of absence, testified that she discharged Bezerra because of her failure to call in when she did not come to work. Lopez denied that Juardo told her that Bezerra was going to be absent.

The record in this case shows that Bezerra had three prior warnings between the period from June 2, 1988, to May 16, 1989. On the other hand, the record also shows that other employees in similar situations have been treated somewhat differently. For example, although Pierre Francois was ultimately discharged on October 11, 1988, for not calling in when absent, the record shows that his discharge occurred only after he had violated the call in rule on ''numerous occasions'' and that he had previously been suspended for ''disregard of these rules.'' In another case, an employee named Annie Bing received a 3-day suspension for not calling in before 3 p.m. when she was absent. Also, the evidence shows that when employees have left the jobsite during work hours without authorization, they have received suspensions.

III. DISCUSSION

A. *The Refusal-to-Bargain Allegations*

As it is obvious that the Respondent has refused to meet and bargain with the Union since at least March 1, 1989, I shall first deal with the Respondent's defenses to the 8(a)(5) allegations for the sake of convenience.

The Respondent asserts that the Charging Party, Local 32B-32J, is not a valid successor to Local 389 and therefore the Company is under no obligation to bargain with the alleged successor. In this regard, the evidence established that Local 389 merged into Local 32B-32J in September 1987, and that the Respondent by its Attorney Joel Keiler, entered into negotiations with Local 32B-32J in September 1988 as the representative of its employees in the respective bargaining units. Indeed at no time during 1988 or 1989 did the Respondent ever assert to the Union that it questioned the validity of the merger. Accordingly, the Respondent is legally estopped from contesting the validity of the Unions' merger and may not raise this issue as a defence to its refusal to bargain. *El Torito-La Fiesta Restaurants*, 284 NLRB 518, 520 (1987), affd. in part and remanded in part in unpublished decision 852 F.2d 571 (9th Cir. 1988); *Knapp-Sherrill Co.*, 263 NLRB 396 (1982).

The Respondent argues that the Company has no obligation to bargain because the Union admits to membership persons who are guards. Assuming this to be true, this would not, in my opinion, give rise to a defence. Section 9(b)(3) of the Act precludes the Board from establishing bargaining units containing guards and nonguards and also precludes the Board from certifying a union for a unit of guards if that union has nonguards as members or is affiliated with a nonguard union. While the Board may conclude that this provision would preclude an 8(a)(5) bargaining order in a unit of guards when the involved union has nonguards as members, *Supreme Sugar Co*., 258 NLRB 243, 245–246 (1981), there is nothing in the statute which would preclude a union having both guards and nonguards as members from representing a unit of nonguard employees. As the Union in the present case has not represented any bargaining unit of the Respondent which contained guards, and as there is absolutely no evidence that the Union would seek to do so in the future (or agree to an expansion of the existing units to include guards), it is clear to me that this defense has no merit.

The Respondent asserted at the hearing that the Union had abandoned its representational rights. However, the Respondent produced no credible evidence to establish such abandonment and it seems to have abandoned this theory in its brief. Therefore, I reject this defence.

Section 8(d) of the Act imposes on employers and unions the mutual obligation to ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder.''

When the Union requested the resumption of bargaining in November 1988, the Company through its attorney refused to meet until March 1989, almost 4 months later. While it may be that the Union was remiss in allowing a hiatus in bargaining from May 4 to November 1988, the Employer could have, but chose not to file an unfair labor practice charge against the Union under Section 8(b)(3) of the Act. In my opinion, the Union's delay in bargaining (probably welcomed

by the Employer), is not a sufficient excuse to allow the Respondent to unduly delay the negotiations further. I therefore conclude that the Respondent violated Section 8(a)(5) by refusing to meet and bargain with the Union until March 1, 1989. *Embossing Printers*, 268 NLRB 710, 721 (1984); *Interstate Paper Supply Co*., 251 NLRB 1423 (1980); and *Imperial Tile Co*., 227 NLRB 1751, 1754 (1977). In the latter two cases, the Board rejected the argument that the company attorneys had crowded schedules. Thus in *Interstate*, supra, the Board cited *Radiator Specialty Co*., 143 NLRB 350, 369 (1963), and stated that the ''Act does not permit a party to hide behind the crowded calendar of his negotiator, whether he be a busy labor attorney or an overworked company officer.''

I further conclude that the Respondent refused to bargain when it canceled the scheduled meetings for March 1989. In this regard, the Respondent violated Section 8(a)(5) by notifying the Union that it would not bargain so long as the Union's unfair labor practice charges were pending. Such a precondition to bargaining is unlawful under *Patrick & Co*., 248 NLRB 390, 393 (1980).

It also is clear to me that by canceling the March 1989 meetings and refusing to meet thereafter, the Respondent in effect, has withdrawn recognition from the Union for each of the respective bargaining units. As there is no evidence to support any possible contention that the Employer had a good-faith reason to doubt the Union's majority status, I conclude that such de facto withdrawal of recognition constitutes a violation of Section 8(a)(5) of the Act. *Terrell Machine Co*., 173 NLRB 1480 (1969), affd. 427 F.2d 1088 (4th Cir. 1970), cert. denied 398 U.S. 929 (1970); *NLRB v. King Radio Corp*., 510 F.2d 1154 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975); *Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

The evidence establishes that the Company refused to comply with the Union's requests on December 4, 1988, and January 10, 1989, for information. As the information requested was clearly relevant for collective-bargaining purposes, I conclude that the Respondent violated Section 8(a)(5) in this respect also. See *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Coalite, Inc*., 278 NLRB 293, 300 (1986); *American Marine Decking Systems*, 277 NLRB 433, 434 (1985).

The evidence shows that the Respondent was responsible for the inability of the Union's agent to have access to the represented employees at the Bloomingdale's location on January 10, 1989. Moreover, when Sarason spoke to Keiler about this on January 16, Keiler told him that the Union would not be allowed to have access to the employees at either the Bloomingdale's or Automatic Switch locations. Additionally, Keiler told Sarason that the Respondent would not permit the Union to inspect the seniority lists at the work locations.

In *Gilberton Coal Co*., 291 NLRB 344 (1988), the Board held that the access provisions of a collective-bargaining agreement survived the expiration of the contract and therefore the Respondent could not, without prior bargaining, unilaterally change such provisions. As the evidence in the present case shows that the Employer's refusal to allow access to the Union was undertaken without prior notice or negotiation, this constitutes a unilateral change, in violation of Section 8(a)(5) of the Act. See also *NLRB v. Great Western Coca-Cola Bottling Co*., 740 F.2d 398 (5th Cir. 1984).

It is alleged and I agree that the Respondent violated Section 8(a)(1) and (5) of the Act when, effective July 1, 1989, it unilaterally reduced the wages and hours of its employees in the Exxon-Linden bargaining unit and eliminated their health insurance. In essence, the Respondent argues that it had a right to do so under an alleged ''most favored nations clause.''

In or about December 1988 the Company tendered a contract proposal to the Union which contained a provision reading:

> The Union agrees that if during the term of this Agreement it enters into any contracts or side letters with any competitor of the Employer, of if any Arbitrator's award or decision is made providing for lower wages, longer hours, or for any terms and conditions more favorable to the Employer than those described in this Agreement, then the Employer shall immediately have the benefit of such provisions or awards or decisions and they shall automatically become part of this Agreement and supersede any less favorable, to the Employer, provisions of this Agreement.

The Respondent contends that when an ''impasse'' was reached regarding the Linden unit during the earlier negotiations with Caprio Sr., the Company, in December 1988 put into effect the terms and conditions of the contract that it had tendered to the Union including the most favored nations clause. The problem with this theory is that even if there was an impasse at that time, it simply is not logically possible for an employer to unilaterally put into effect a most favored nations clause. This is because such a clause, by its very nature, requires the Union's consent and such consent therefore cannot be unilaterally imposed.

When the Employer unilaterally reduced wages, hours, and benefits at the Exxon-Linden location in July 1989, there was no impasse in the negotiations as the Respondent had refused to meet and bargain. As such, this action by the Employer is concluded to have violated Section 8(a)(1) and (5) of the Act.

B. *The Constructive Discharges*

I have concluded above that the Employer violated the Act by unilaterally reducing the wage rates and hours of its employees at the Exxon-Linden unit as well as by eliminating their medical insurance benefits. There was evidence that some but not all the employees in this bargaining unit quit their jobs because of these unlawful changes which effectively reduced their earnings by almost a half.

In *Adscon, Inc*., 290 NLRB 501, 502 (1988), the Board stated:

> The Board has held that a constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable. Two elements must be proven to establish a constructive discharge. First, the burdens imposed on the employee must cause and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, it must be shown that

> those burdens were imposed because of the employee's union activities.

In my opinion the conditions set forth in *Adscon*, supra, have substantially been met in the present case. The unilateral reduction in the pay of the employees and the elimination of their health insurance was unlawful and carried out in the context of the Respondent's refusal to recognize, deal with, or negotiate with the Union. Further, it would be reasonable to expect that a reduction in pay of this magnitude (even absent the loss of medical insurance), would result in the ''voluntary'' termination of many of the bargaining unit employees. Thus, where the result of an action is clearly foreseeable, I must conclude that it was intended.

Based on the above, I conclude that the General Counsel has established that employees in the Exxon-Linden bargaining unit were constructively discharged on or about July 1, 1989. In this respect, I conclude that the General Counsel has proven his case as to the persons who told Sarason that they had resigned because of the unilateral changes. I also conclude that there may have been other employees who were similarly discriminated against but whose identities are presently unknown because of the Respondent's failure to furnish information to the Union and because of its failure to comply with valid subpoenas. Accordingly, I reject the Respondent's contention that the General Counsel should be required to seek enforcement of the subpoenas in order to obtain evidence in support of the 8(a)(3) allegations. Clearly such a holding would result in a substantial delay in the processing of this case, which otherwise was proven by secondary evidence. In effect, the Respondent, which I believe is seeking to avoid or delay its statutory obligations, would be aided and abetted in its goals if the General Counsel was required to enforce the subpoenas through a separate action in the Federal courts.

C. *Union Insignia*

The record establishes that in December 1989 at the Exxon-Florham Park location, the Respondent prohibited employees from wearing small green dots which were intended to show union solidarity.

I conclude that the Respondent's prohibition on wearing these insignia in the work area did not serve any legitimate business concern. As there was no showing that the insignia contained messages that were vulgar, obscene, or otherwise offensive, or that they were worn in such a way as to obscure the employee badges, I shall conclude that the Company has violated Section 8(a)(1) of the Act by enacting the prohibition. *NLRB v. Malta Construction Co*., 806 F.2d 1009 (11th Cir. 1986); *Cannon Industries*, 291 NLRB 632 (1988); *Page Avjet Corp*., 275 NLRB 773 (1985); *Albertson's, Inc*., 272 NLRB 865 (1984); *Dixie Machine Rebuilders*, 248 NLRB 881, 882 (1980).

D. *The Discharge of Luiza Bezerra*

Bezerra was the Union's designated shop steward in the Exxon-Linden bargaining unit. In December 1988, when the Employer put into effect wage increases at this location, Bezerra announced at a meeting that retaining the Union as the employees representative was more important to the employees (at least in her opinion), than more money. In the spring of 1989, Bezerra solicited the employees at this location to sign new union authorization cards. In summary, she was the most active union supporter at the Exxon-Linden location; a fact known to the Employer.

The evidence also establishes that this employer demonstrated antiunion animus as noted above. Thus, the record in this case clearly demonstrates a desire to delay and avoid its legal obligations to bargain with the Union. In these circumstances, the General Counsel has made out a prima facie case of illegal discrimination against Bezerra.

The Company defends the discharge of Bezerra by asserting that she failed to call in on a day that she was absent from work. However, the credible evidence of Bezerra and Juardo shows that Juardo did inform Supervisor Lillian Lopez that Bezerra would not be in on the morning in question. Moreover, the evidence also indicates that other employees who failed to call in when absent did not suffer discharge, thereby indicating to me disparate treatment. As stated by the court in *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1986).

> It bears repeating that the ''essence of discrimination in violation of section 8(a)(3) is treating like cases differently.'' [Citations omitted.]

Accordingly, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982), the burden is shifted to the Respondent to establish that it would have discharged Bezerra for good cause despite her protected activity. Since I find Respondent's evidence in support of its defence to be unpersuasive, I shall conclude that the Company violated Section 8(a)(3) and (1) by discharging her.

CONCLUSIONS OF LAW

1. Control Services Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 32B-32J, Service Employees International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein the Union has been the exclusive representative of certain employees of the Respondent in units appropriate for the purposes of collective bargaining (as described above), within the meaning of Section 9(a) of the Act.
4. By refusing to meet and bargain with the Union at reasonable times, the Respondent has violated Section 8(a)(1) and (5) of the Act.
5. By refusing to furnish relevant information requested by the Union in December 1988 and January and February 1989, for purposes of collective bargaining, the Respondent has violated Section 8(a)(1) and (5) of the Act.
6. By withdrawing recognition from the Union in the aforesaid bargaining units on or about March 1, 1989, the Respondent has violated Section 8(a)(1) and (5) of the Act.
7. By denying or causing the denial of access to the Union to Respondent's employees and by denying the Union access to seniority lists, the Respondent has violated Section 8(a)(1) and (5) of the Act.
8. By unilaterally reducing the wages and hours of the employees at the Exxon-Linden bargaining unit and by eliminating their medical insurance on July 1, 1989, the Respondent has violated Section 8(a)(1) and (5) of the Act.

9. By constructively discharging employees in the Exxon-Linden bargaining unit, on or about July 1, 1989, the Respondent has violated Section 8(a)(1) and (3) of the Act.

10. By barring employees from wearing union insignia at the Exxon-Florhan Park bargaining unit, in December 1989, the Respondent has violated Section 8(a)(1) of the Act.

11. By discharging Luiza Bezerra on June 12, 1989, because of her membership in and/or activities on behalf of the Union the Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

With respect to the constructive discharges found to be violative of Section 8(a)(1) and (3) of the Act, it is presently unknown as to whether there were other employees at the Exxon-Linden bargaining unit who may have resigned as a result of the Respondent's unlawful reduction in wages, hours, and benefits. In large part the reason that this information is not available is because the Respondent unlawfully failed to provide information to the Union (including the names and addresses of employees), failed to allow the Union to have access to employees and seniority lists and refused to comply with valid subpoenas which would have disclosed this information.

I shall therefore leave to compliance the task of determining whether there were any other employees at the Exxon-Linden location who resigned for similar reasons. In this regard, it is recommended that if it is revealed, by examination of the Respondent's records, or otherwise, that certain other employees at Exxon-Linden ceased employment within a reasonable period of time after the Company announced the wage and benefit reductions (in June 1989), it should be presumed that such employees resigned because of the reductions and therefore were constructively discharged. Respondent would, however, be permitted to rebut such presumption by coming forward with appropriate evidence showing that such employees resigned or were terminated for other reasons. I would further recommend that such a presumption attach to any employee who left prior to August 1, 1989, that being deemed a reasonable period of time.

Also, in relation to the employees at Exxon-Linden, including those who remained employed as well as those constructively discharged, it is recommended that they be made whole for any losses they may have suffered because of the unilateral reductions in wages, hours, and benefits. In connection with the elimination of medical insurance, it is recommended that the Respondent make whole any employee, whether constructively discharged or in its continued employment, for any medical costs incurred which would otherwise have been paid for or reimbursed by the eliminated medical insurance plan.

Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order, requiring the Respondent to cease and desist from infringing in any manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Control Services Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain with the Union at reasonable times.

(b) Refusing to furnish relevant information requested by the Union for purposes of collective bargaining.

(c) Withdrawing recognition from the Union.

(d) Denying the Union access to the Respondent's employees and to seniority lists.

(e) Unilaterally reducing the wages and hours of the employees in the Exxon-Linden bargaining unit and eliminating their medical insurance.

(f) Barring employees from wearing union insignia.

(g) Discharging or constructively discharging employees because of their membership in and/or activities on behalf of the Union.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate bargaining units described above, concerning terms and conditions of employment and, if understandings are reached, embody the understandings in signed agreements.

(b) Offer Luiza Bezerra, Rita Juardo, J. Bentencourt, A. Diaz, L. Dessnatos, J. Malinowaski, J. Pinkiewicz, J. Pinton, R. Wasilco, A. Zasadzki, and any other employees in the Exxon-Linden bargaining unit who were constructively discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Make whole the employees in the bargaining units described above, for any losses in earnings and/or benefits that resulted from the unilateral changes in wage rates, hours, benefits, or any other terms and conditions of employment.

(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facilities including the locations of each of the bargaining units involved in these cases, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''